Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	MM Docket No. 93-87
	)	
RAYMOND W. CLANTON	)	File No. BPH-911216MC
	)	
LOREN F. SELZNICK	)	File No. BPH-911216MD
	)	
For Construction Permit for a new FM Station on Channel 279A in El Rio, California	)	

To: Administrative Law Judge
John M. Frysiak

OPPOSITION TO MOTION TO ENLARGE THE ISSUES

Raymond W. Clanton, by his attorney, respectfully opposes the Motion to Enlarge the Issues, filed by Loren F. Selznick on August 23, 1993, in the above-captioned proceeding. In support thereof, the following is shown.

Selznick requests an issue as to whether Clanton deliberately misrepresented his residence in his original application, filed December 16, 1991. Selznick's motion is entirely without merit, and should be dismissed as completely frivolous.[1]

The entire factual basis of Selznick's motion is her assertion that Clanton claimed he had full time (emphasis in original) residence in the service area in his application as

[1] The Presiding Judge has the authority to determine whether the filing of such a motion amounts to an abuse of the Commission's processes warranting the imposition of sanctions on Selznick.

originally filed. Selznick goes on to recite that in an amendment filed March 10, 1992, during the amendment as of right period, Clanton reported that between 1986 and 1988 he resided in the service area approximately 85% of the time, and from 1988 to January 1992 (after the application was filed) he resided there about 70% of the time. Selznick concludes that Clanton's description in his original application was a disqualifying misrepresentation, relying on California Public Broadcasting Forum v FCC, 752 F. 2d 670, 679-80 (D. C. Cir. 1985) for the proposition that "an intent to deceive the FCC can be inferred where an applicant makes a statement that it knows at the time to be false." Selznick also cites Citizens Committee to Save WEFM v FCC, 605 F2d 246, 365-66 (D. C. Cir. 1974), for the proposition that a hearing may be required on a misrepresentation issue even where there is no proven intent to deceive.

Selznick's arguments are both factually and legally incorrect. There is nothing in Clanton's original application which states that his residence in the service area was "full time". The plain language which appears in the application is "Mr. Clanton will claim enhancement to his integration proposal for his residence at the following locations within his proposed station's 1 mV/m contour:..." Clearly, these locations, where Mr. Clanton was spending from 70% to 85% of his time, constituted his principal residences, which is the import of his statement. Selznick has mischaracterized

Clanton's statement by inserting the words " full time", which do not appear. Hence, there is no factual basis for her Motion, and it must be dismissed out of hand.[2]

Clanton voluntarily provided the details of his service area residence in the aforementioned March 10 amendment. This amendment was filed well in advance of the May 4, 1992, deadline for amendments as of right. Hence, Selznick had full opportunity to amend her application in response to Clanton's amendment, has she so desired. Moreover, when the information contained therein changed, Clanton voluntarily filed other amendments, thus keeping his application current, as required by Section 1.65 of the Commission's rules. No one has been mislead or prejudiced by Clanton's application and amendments.

The matter presented by Selznick is quite similar to that adjudicated in Garrett, Andrews & Letizia, Inc., 86 FCC 2d 1172 (Rev. Bd. 1981), a case not mentioned by Selznick. [3] There, as here, the petitioner requested a misrepresentation issue, alleging that the opposing applicant was not fully candid in reporting the extent of its principals' out-of-state residences. The Commission found no basis there for a

---

[2] Petitioners have been admonished in the past to "exercise a high degree of care to the end that their pleadings be free of misstatement and other inaccuracies", particularly where "they are charging their opponents with misrepresentations, nondisclosures and ineptness." Mt. Carmel Broadcasting Co., 8 FCC 2d 1033 (Rev. Bd. 1967).

[3] It must be assumed that counsel for Selznick is not aware of this case, for he had a duty to disclose it in his pleading pursuant to Rule 3.3(a)(3) of the Rules of Professional Conduct of the District of Columbia Bar.

misrepresentation issue; similarly no basis exists for an issue here.

Selznick's motion is procedurally defective as well. The information upon which she relies was before the Mass Media Bureau when it designated these two applications for hearing. As the Bureau found Clanton fully qualified in the Hearing Designation Order, Selznick's petition essentially seeks reconsideration of that finding, an impermissible request. The Presiding Judge may not overrule the Bureau's finding absent presentation of evidence not considered by the Bureau.

With respect to Selznick's allegation of intent to deceive stemming from submission of a knowingly false statement to the Commission, it is well-established that minor errors do not give rise to a qualifying issue.[4]

The Commission has recently discussed the effect of an improper application certification on the applicant's basic qualifications. In License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania, DA 93-1035, released August 24, 1993 (Chief, Audio Services Division), the Commission stated that not every improper certification raises a question of the applicant's character qualifications. Citing Golden Broadcasting Systems, 68 FCC 2d 1099, 1106 (1978), the Commission noted that an issue is warranted only where the record establishes an intent to

[4] That is, assuming, arguendo, that Clanton's application contained an error.

deceive the Commission or "a degree of carelessness so 'wanton, gross, and callous' as to be the equivalent of an affirmative and deliberate intent to deceive." [5]

In MCI Telecommunications Corp., 3 FCC Rcd 509, 512 (1988), the Commission emphasized:

> Unless there is evidence showing "deceptive intent," we will not be able to find that misrepresentation or lack of candor has occurred... The "bare existence of a mistake" in an application, without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact.

Moreover, even knowingly false statements may not be disqualifying when there are mitigating circumstances. One such mitigating circumstance is that the applicant clarified the statement voluntarily.

For example, in Broadcast Associates of Colorado, 104 FCC 2d 16 (1986), an applicant was found fully qualified despite having testified falsely under oath about the circumstances surrounding her signing the application. The Commission found that her testimony was an isolated instance, that she recanted, and thus could be trusted with a broadcast license. Other cases in which the Commission held that the applicant's missteps were not so serious as to require disqualification include Fenwick Island Broadcasting Limited Partnership, 7 FCC Rcd 2978 (Rev. Bd. 1992), (Incomplete answer at deposition did

---

[5] The Commission also cited in general Fox River Broadcasting, 93 FCC 2d 127, 129 (1983).

not raise a character question.) and Cannon Communications Corp., 5 FCC Rcd 2695 (Rev. Bd. 1990) (Mistake in describing the transmitter site was not a deliberate misrepresentation.).

Selznick asserts that Clanton's motive was to deter competing applicants, and alleges that he came forth with the truth only after he recognized that his sole opponent had no local residence credit whatsoever. Selznick's argument is speculation of the highest order. She presents no facts to demonstrate that Clanton had an ulterior motive in preparing his original application or in filing his March 1992 amendment. It is facially clear that Clanton's amendment was for the sole purpose of making his application completely correct.

Clanton could not have deterred other applicants with his filing, for he filed on the last day of the filing window. No prospective applicant would have known of Clanton's filing or of the contents of his application in time for that to serve as a basis for a decision on whether or not to file for the El Rio station. In addition, there is no factual basis whatsoever for Selznick's conjecture that Clanton would not have amended his application in March 1992 had there been an applicant with local residence. The record shows that Clanton has abided by the Commission's reporting requirements. Nothing more need be said.

In sum, Selznick's factual predicate for her motion is non-existent, as it is based upon a misreading of Clanton's exhibit. Furthermore, it is procedurally flawed, for it

presents no new material. Finally, even if, arguendo, Clanton is deemed to have been slightly less than fully candid with the Commission in his original application, the failing is not of sufficient magnitude to give rise to an issue.

Accordingly, the Motion to Enlarge Issues, filed by Loren F. Selznick should be summarily denied.

Respectfully submitted,

RAYMOND W. CLANTON

By _____
Jerrold Miller
His Attorney

August 30, 1993

Miller & Miller, P.C.
P.O. Box 33003
Washington, DC 20033

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of August, 1993 a copy of the foregoing document was placed in the United States mail, first class postage prepaid, addressed to the following:

Paulette Laden, Esq.
Hearing Branch, Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, NW., Suite 7212
Washington, DC 20554

Robert L. Thompson, Esq.
Pepper & Corazzini
1776 K Street, NW, Suite 200
Washington, DC 20006

Robin Green